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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-336

DELTA AIR LINES, INC.,

Petitioner,

VERSUS

JAMES McBRIDE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI
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The petitioner, Delta Air Lines, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on March 11, 1977.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Sixth Circuit, reported at 551 F.2d 113, is reproduced in the Appendix hereto (App. p. A-1).

The Opinion of the District Court for the Western District of Tennessee, dated September 11, 1974, which is not reported, is reproduced in the Appendix hereto (App. p. A-22). The District Court's Opinion, dated March 5, 1975, which is not reported, is reproduced in the Appendix hereto (App. p. A-27). The District Court's Final Decree, dated March 17, 1975, which is not reported, is reproduced in the Appendix hereto (App. p. A-33).

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on March 11, 1977. A timely filed petition for rehearing en banc was denied on June 3, 1977, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. What are the standards by which the EEOC charge, investigation and conciliation limit the permissible scope of an individual's Title VII judicial complaint?

2. Do the policy considerations of Title VII set a special standard so that courts of appeals may direct district courts on remand to consider matters beyond the scope of the pleadings, evidence at trial and assignment of error on appeal?

3. In a Title VII suit where the individual named plaintiff was found not to be a victim of discrimination and therefore not entitled to relief, may he nevertheless, consonant with Rule 23 of the Federal Rules of Civil Procedure, represent members of a purported class who allegedly were subject to discrimination?

STATUTORY PROVISIONS INVOLVED

Section 706(a) through (g) of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-5(a) through (g), and Rule 23(a) through (d) of the Federal Rules of Civil Procedure are reproduced in the Appendix hereto (App. pp. A-42 through A-53).

STATEMENT OF THE CASE

The plaintiff, James McBride, initiated this action under the provisions of Title VII of the Civil Rights Act of 1964, as amended, and 42 U.S.C. § 1981 alleging that Delta Air Lines, Inc. (Delta) discriminated against him on the basis of race when he was discharged following his conviction of assault and battery on local police officers. McBride also asserted that he was seeking relief on behalf of other black Delta employees and applicants for employment at the Memphis terminal, claiming that Delta had discriminated with respect to hiring, promotion, compensation, terms, conditions and privileges of employment. Jurisdiction was based on § 706(f) of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f), and on 28 U.S.C. § 1343(4).

I. McBride's Employment History

Delta employed the plaintiff McBride, a black person, as a skycap at the Memphis International Airport on November 4, 1968, at a time when it was hiring few new employees anywhere on its system. Within a very few months on February 10, 1969, McBride was advanced in effect two levels to the position of Cargo Service Agent in Delta's freight division, skipping in the process the intermediate position of Cabin Service Support Agent. By this two-step promotion at a time when for economic

reasons promotions at Delta were relatively rare, McBride became the first black in Delta's freight division at Memphis and was treated as favorably as, if not more favorably than, other black or white Delta employees.

During the year following his double promotion, McBride's service record was marred by a series of accidents. While handling Company equipment on the premises he failed to meet the high standard of care demanded of common carriers, being involved in three accidents, one of which resulted in damage to a customer's property and all of which resulted in damage to Company property. To compound the problem, McBride violated Company policy by concealing his responsibility for one of the accidents until pressured by fellow employees to admit his fault. He was also reprimanded on several occasions for tardiness and for one unauthorized absence.

On May 3, 1969, while off duty, McBride participated in an assault upon Memphis Police Officers during the course of a police investigation of an automobile accident in which he was involved. When the officers attempted to elicit information about the accident, McBride and other members of his family became belligerent, attacking the officers with such severity that it was necessary to summon additional police cars. The altercation and ensuing arrest did not involve racial implications since one of the two police officers attacked was black.

Though under indictment, McBride continued to work for Delta during the year prior to his trial for assault. On May 8, 1970, he was convicted of assault and battery and was sentenced to thirty days in the Shelby County Penal Farm. Delta then terminated his employment on May 14, 1970, for conduct unbecoming an employee because of his conviction of and incarceration for a crime of violence and because of his poor work record. His discharge was consistent with Delta's

nationwide policy of discharging persons convicted of crimes without regard to race, creed, color, sex or national origin. In short, McBride's employment record was such as to justify his discharge for cause.

II. McBride's Individual Claim of Discrimination

On July 13, 1970, McBride filed a charge with the EEOC stating simply "The company discharged me because of my Negro race." A copy is reproduced in the Appendix (App. p. A-35; Trial Exhibit 31). Based upon this narrow charge the EEOC confined its investigation to Delta's policy of discharging employees convicted of a violent crime and the effect of that policy on Delta's Memphis terminal employees. A copy of the District Director's Findings of Fact is reproduced in the Appendix (App. p. A-36; Trial Exhibit 31).

Following the EEOC investigation and attempts at conciliation, McBride filed this suit. The trial of the issues was carried out as two separate hearings. All proof of McBride's individual claim was introduced at a hearing in January, 1974, at the conclusion of which the district court determined that McBride had been discharged for cause and that Delta's policy of discharging convicted employees was racially neutral both in purpose and in effect. The Court of Appeals for the Sixth Circuit, affirmed the district court's dismissal of McBride's individual claim.

III. The Scope of Class Allegations of Racial Discrimination

While the EEOC charge, investigation and conciliation efforts were limited to Delta's discharge policies at the Memphis Terminal, McBride alleged in his district court complaint that he represented in this action a class "composed of Negro

persons who are employed, or might be employed, by Delta Air Lines, Inc., at its district office located in Memphis, Tennessee," whom he alleged had been discriminated against "with respect to compensation, terms, conditions and privileges of employment" and particularly with respect to Delta's system of hiring and promotion. A motion by Delta to strike these claims on the ground that they went beyond the scope of the charge and the EEOC investigation was rejected early in the proceedings by the district court, which refused to limit the issues and evidence to Delta's discharge policy. (App. p. A-18).

At the second hearing, held in December, 1974, the court heard additional proof on the class claims. Never at any time prior to or in the course of either hearing did McBride seek to have a class certified under Rule 23(c). As a matter of fact, McBride did not again appear in court after the district court ruled adversely to him on his individual case, and the second hearing proceeded without his presence or participation.

Following the first hearing the district court entered an Order inviting further proof in respect to Delta's employment practices at the Memphis terminal. (App. p. A-22). Plaintiff offered no objection to this restriction of the proof to be presented at the subsequent hearing and offered no evidence concerning systemwide employment policies other than discharge. He presented evidence concerning Delta's other employment practices only in respect to the Memphis terminal, a course entirely consistent with his theory that he represents a class limited to Memphis terminal employees. Upon the conclusion of the second hearing, the district court detailed its many findings of no discrimination as to each of the class allegations and declared that "the Court had not found defendant guilty of any pattern or practice of racial discrimination since 1968, under all the circumstances at Memphis." (App. p. A-32). It declined to certify a class and dismissed the class claims without prejudice. This finding is entirely incompatible

with the unsupported statement of the majority opinion of the court of appeals that the "district court implicitly finds that there was a pervasive pattern of discriminatory employment practices at Delta." (App. p. A-3).

At no point in the proceedings did either party or the district court consider that the class claims involved other than Memphis terminal employees – as reflected by the claims asserted in the complaint, the evidence adduced at trial and the opinion issued by the court. Nor did the plaintiff assign as error or argue in his brief in the court of appeals that the appropriate scope of the case should be broader than was considered by the district court. In fact, in his petition for certiorari recently filed with the Clerk of this Court, McBride continues to assert that the class which he represents consists only of blacks employed at Delta's Memphis terminal. Although no basis existed in law, fact or reason for expansion of the scope of the case beyond the areas inquired into by the district court, the court of appeals remanded the case for review of the class question and directed the district court to consider Delta's nationwide employment policies.

IV. Ruling of Court of Appeals on Class Claims

As the basis for its instructions on remand, the Sixth Circuit Court of Appeals purported to rely on its decision in *Tipler v. E. I. duPont de Nemours and Company, Inc.*, 443 F.2d 125 (6th Cir., 1971), which was avowedly based upon the Fifth Circuit rule expressed in *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir., 1970). Quoting the rule from *Sanchez*, *Tipler* had stated that:

> [T]he complaint in the judicial proceedings is only limited to the scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination. 443 F.2d at 131.

However, in *McBride v. Delta Air Lines, Inc.*, the Sixth Circuit opinion distorted the *Sanchez* standard beyond recognition in the paragraph which states:

> McBride's complaint to the EEOC alleged that he had been discharged because of his race. The EEOC's *conciliation* effort might reasonably have been expected to be restricted to Delta's discharge policies, and perhaps even particularly to the conviction rule which, according to McBride, was racially discriminatory in effect. However, in order to determine whether the discharge policy was racially motivated or was racially discriminatory in effect, the *investigative* effort would certainly have required review of any racially discriminatory practices within Delta's large and complex personnel structure. Indeed, a pervasive pattern of discriminatory effects may support an inference of intentional discrimination underlying the individual charge of discriminatory firing. See *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, ____ U.S. ____, 97 S.Ct. 555, 50 L.Ed. 2d 450 (1977). Therefore, the case must be remanded for a determination of the appropriate scope of the class in light of the *Tipler* standard. 551 F.2d 115.

With this holding the Sixth Circuit threw out the rule of reason enunciated in *Sanchez* replacing it with an unbending rule of law best expressed as a syllogism:

1. The judicial complaint is limited only to the scope of the EEOC investigation reasonably expected to grow out of the EEOC charge.

2. The EEOC investigative effort, even on a limited charge, requires inquiry into all employment practices within the employer's large and complex personnel structure.

3. Therefore, the judicial complaint is unlimited in scope and must extend to all employment practices within the employer's nationwide personnel structure.

The court of appeals directed the district court to reevaluate the class question without regard to the limited scope of the issues embraced in McBride's charge, the EEOC investigation, findings, and conciliation process, or the scope of plaintiff's pleadings, proof and assignments of error. Sharply departing from the traditional notion of American jurisprudence which requires that the issues litigated and the proof offered at trial be left in the hands of the parties litigant, the court of appeals overrode all previously recognized limits to class certification. It prescribed a full scale inquiry into Delta's nationwide employment practices without regard to plaintiff's costs or selected strategy in fashioning his own lawsuit or the fact that Delta's employment practices had been the subject of a nationwide consent decree between Delta and the United States under the auspicies of the District Court for the Northern District of Georgia only nine months before the opening of the McBride trial.

The instructions of the court of appeals are contrary to Title VII, Rule 23 of the Federal Rules of Civil Procedure, and the law expressed by other courts of appeals. If this standard is allowed to become the class certification rule, even the simplest EEOC charge will create a project of gargantuan proportions, heavily burdening already beleaguered litigants and courts. Judge Weick, in his vigorous dissent in this case, demonstrated the unreasonableness of the rule and its inevitable results when he stated:

> The company would hardly expect to be put under a microscopic investigation of all of its hiring, promotion, and seniority policies in its nationwide organization, merely because of a neutral company discharge rule governing all employees irrespective of race, which rule had been applied to only one employee in its Memphis terminal, because of his conviction of a violent crime. 551 F.2d at 119.

REASONS THE WRIT SHOULD BE GRANTED

This Petition presents questions of extreme importance which have never been passed upon by this Court. In this case in which Delta seeks review, the Sixth Circuit has summarily disregarded the prevailing authority in other circuits: denying the existence of any relationship between the EEOC charge, investigation and conciliation on the one hand and the judicial complaint on the other; discarding the requirement of adequacy of representation in Title VII class actions; and requiring examination in every EEOC case of all of the defendant's employment practices, whether the plaintiff has sought to challenge all such practices or not. In short, there exists compelling reason for granting this writ.

1. The Decision Below Conflicts with the Decisions of Other Courts of Appeals as to the Permissible Scope of a Judicial Complaint Based upon a Limited EEOC Charge, Investigation and Conciliation.

Contrary to the decisions of other circuits the Sixth Circuit Court of Appeals has declared that the filing of a limited unfair employment practice charge opens the field for a judicial complaint covering all the multifaceted operations of an employer though his operations may be national in scope.

This decision ignores the efforts of other courts of appeals to reconcile two competing policy considerations under Title VII in deciding whether to permit an individual to raise claims not included in his EEOC charge. On the one hand, the courts have recognized that the charging party is often uneducated and inarticulate, and if held to a high standard of literary exactitude, may be blocked from securing redress of his real grievances because technically he may have inadequately expressed them. On the other hand, prior to the decision of the Sixth Circuit in this case, courts of appeals have recognized that the policies of the Act favoring informal persuasion and voluntary compliance would be undermined if individuals were given complete freedom, much less required, to litigate allegations of discrimination which were never presented to the EEOC for investigation and conciliation. As this Court has stated, cooperation and voluntary compliance through the conciliation process as set forth in § 706(b) of the Act were selected as the preferred means for achieving the goals of Title VII. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

The earliest and most frequently cited appellate decision defining how far a Title VII complaint may depart from the words of the EEOC charge is *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir., 1970). The court analyzed the relationship between the EEOC charge and the judicial proceedings, stating:

> A charge of discrimination is *not* filed as a preliminary to a lawsuit. On the contrary, the purpose of a charge of discrimination is to trigger the investigatory and conciliatory procedures of the EEOC. Once a charge has been filed, the Commission carries out its investigatory function and attempts to obtain voluntary compliance with the law. Only if the EEOC *fails* to achieve voluntary compliance will the matter

ever become the subject of court action. Thus, it is obvious that the civil action is much more intimately related to the EEOC investigation than to the words of the charge which originally triggered the investigation. *Within this statutory scheme, it is only logical to limit the permissible scope of the civil action to the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.* *Id.* at 466. (emphasis supplied)

A more exacting rule, stated the Fifth Circuit, "would impede the ability of the Commission to effect voluntary compliance" since the EEOC must proceed on charges filed by persons untutored in the technicalities of the law. Likewise, "[a] *less* exacting rule would also circumvent the statutory scheme, since Title VII clearly contemplates that no issue will be the subject of a civil action until the EEOC has first had the opportunity to obtain voluntary compliance." *Id.* at 467. As the *Sanchez* court recognized, the EEOC's opportunity to conciliate is a primary factor in the determination of the permissible scope of a Title VII judicial complaint.

Following the lead of the Fifth Circuit, Courts of Appeals for the Third and Fourth Circuits have recognized the importance of limiting the scope of an individual's judicial complaint to matters which the EEOC has had an opportunity to investigate and conciliate. In *Ostapowicz v. Johnson Bronze Co.*, 541 F.2d 394 (3d Cir., 1976), the Third Circuit Court of Appeals adopted the *Sanchez* standard, stating:

> In order to comply with the spirit of the Act, there must be some limitation on suits in the district court so that the Commission will have the first opportunity to examine the allegations of discrimination. *Id.* at 398.

In *King v. Seaboard Coast Line R.R.*, 538 F.2d 581 (4th Cir., 1976), the court declared:

> [The EEOC] charge, enlarged only by such EEOC investigation as reasonably proceeds therefrom, fixed the scope of the charging party's subsequent right to institute a civil suit. The suit filed may encompass only the 'discrimination stated in the charge itself or developed in the course of a reasonable investigation of that charge.' *Id.* at 583.

The Seventh and Ninth Circuit Courts of Appeals have adopted a slightly different approach which emphasizes the words of the EEOC charge rather than the EEOC's opportunity to conciliate in defining the scope of the judicial complaint. Nevertheless both circuits have recognized that the scope of the litigation must bear a reasonable relationship to the scope of the EEOC charge. *Oubichon v. North American Rockwell Corp.*, 482 F.2d 569 (9th Cir., 1973); *Jenkins v. Blue Cross Mutual Hospital Insurance, Inc.*, 538 F.2d 164 (7th Cir., 1976). With the sole exception of the Sixth Circuit, every circuit which has passed upon the question has recognized that the scope of the EEOC charge, investigation and conciliation imposes limits upon the scope of Title VII litigation.

In circuits where the courts of appeals have not considered the question, district courts, have also espoused the practice favoring voluntary compliance by limiting the scope of a Title VII judicial complaint to those issues which grow out of or are reasonably related to the EEOC's investigation and conciliation. *Sciaraffa v. Oxford Paper Co.*, 310 F.Supp. 891 (D. Me., 1970); *Hecht v. Cooperative for American Relief Everywhere, Inc.*, 351 F.Supp. 305 (S.D.N.Y., 1972); *Kinsey v. Legg, Mason & Co., Inc.*, 60 F.R.D. 91 (D.D.C., 1973).

All circuits which have considered the matter, other than

the Sixth Circuit agree that district courts should be required to consider only those practices which bear a *reasonable relationship* to the EEOC charge. In *McBride v. Delta Air Lines, Inc.*, however, the Sixth Circuit has expressly and radically departed from that standard (including its own former standard in *Tipler v. E. I. duPont de Nemours, Inc., supra*) by declaring as a matter of law that the EEOC investigation which the limited charge might "reasonably" be expected to stimulate includes investigation of *all* of Delta's employment practices throughout the nation. This construction deprives the term "reasonable" of all meaning. It ignores both the words of McBride's EEOC charge and the reasonable EEOC investigative and conciliatory efforts expected to grow therefrom, let alone the scope of the EEOC investigation actually conducted in this case. It requires the district court to consider all of Delta's nationwide employment practices regardless of their relationship to the words of the charge or to the wrong as to which McBride alleged in his judicial complaint that he was aggrieved. No other circuit has remanded a Title VII case for consideration of matters beyond the scope of the charge, pleadings, proof or assignments of error.

Furthermore, the Sixth Circuit entirely ignored the *actual* scope of the EEOC investigation and conciliation efforts as expressed in the District Director's Findings of Fact in this case. The Findings of Fact show that the EEOC limited its investigation to Delta's policy of discharging those Memphis terminal employees who were convicted of crimes. (App. p. A-36). Where a court is presented with evidence of the actual scope of the EEOC investigation, it should not be permitted to ignore that evidence. The court of appeals usurped the statutorily mandated function of the EEOC when it declared that the EEOC's "*investigative* effort would certainly have required review of any racially discriminatory practices within Delta's large and complex personnel structure." The EEOC did not find that the issues raised by the charge should range so

broadly and neither should the courts. Since the EEOC is vested by Congress with responsibility for investigation and conciliation, "the matters the Commission proceeds to investigate should assist in determining the scope of the complaint for purposes of applying Title VII's jurisdictional requirements." *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979, 988 (D.C. Cir., 1973). *See, e.g., Ostapowicz v. Johnson Bronze Co., supra* at 399. Thus, in this respect as well the Sixth Circuit has departed from the approach of other courts of appeals by denying any importance to the actual EEOC investigative and conciliatory efforts in the determination of the permissible scope of Title VII litigation.

The Sixth Circuit has jettisoned the rule of reason by destroying all strictures which other courts of appeals have found to limit Title VII judicial complaints. Through the fiction that the EEOC investigation of a limited charge must "reasonably" extend to all employment practices within Delta's large and complex personnel structure, the court of appeals has thrown this suit open to matters beyond the scope of any issues raised by either party below or by the district court. In so holding the Sixth Circuit Court of Appeals is in direct conflict with all decisions of other courts of appeals and has negated the conciliatory purpose of Section 706 of the Civil Rights Act of 1964. If the decision is allowed to stand, each plaintiff who brings suit against a nationwide employer in the Sixth Circuit will be saddled with the expense and burden of litigating the entire spectrum of employment policies of the defendant on a nationwide basis every time any employment policy, no matter how limited, is raised in an EEOC charge. The already overburdened courts will be turned into administrative or investigative policemen, examining every employment practice of every national employer. This result is neither required nor permitted by the Civil Rights Act of 1964.

2. **In Ordering Consideration of Matters Beyond the Scope of the Trial and the Matters Raised by the Parties on Appeal, the Decision Below So Far Departs from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of this Court's Supervisory Power.**

In mandating an examination of all employment policies in Delta's nationwide organization, the Sixth Circuit's instructions on remand require the district court to consider matters beyond the scope of the trial and the matters raised by the parties on appeal. The class allegations of the Complaint extend only to "Negro persons who are employed, or might be employed, by Delta Airlines, Inc. *at its district office located in Memphis, Tennessee*." (Emphasis supplied). As the record plainly shows plaintiff never offered any evidence on Delta's employment policies (other than the conviction-discharge policy) on a nationwide basis and never indicated any desire to expand his proposed class beyond the Memphis terminal employees. Nor did the plaintiff argue in the court of appeals that the district court had limited in any manner the scope of the class he sought to represent. He assigned as error the district court's refusal to certify him as a representative of blacks in the local terminal operation at Memphis, Tennessee, but at no time during trial or on appeal did he indicate a desire to represent a class broader then Delta's black terminal employees at Memphis or to introduce evidence concerning Delta's employment practices other than at the Memphis terminal.1/ Thus throughout the trial and appellate process, the parties and the district court limited their consideration of the class issues to Delta's Memphis terminal facility.

1/ The Court heard nationwide evidence concerning Delta's policy of discharging persons convicted of crimes in connection with McBride's individual claim. This proof was the only nationwide evidence offered.

Nevertheless, the court of appeals on its own initiative raised for the first time the issue of whether the class issues under consideration should be expanded to include all employment practices within Delta's large and complex personnel structure and remanded for a "reformulation of the scope of the [purported] class" in the light of these broader issues. This ruling by the Sixth Circuit does violence to a number of the foundational principles of the Anglo-American adversary system.

First, the parties to litigation and not the courts determine by proper pleadings and proof the parameters of the issues they expect to litigate. Professor Wigmore states:

> The apportionment of the task of adducing evidence is one of the most characteristic features of the Anglo-American system. It is placed wholly upon the parties to the litigation; it is not required or expected of the Judge. 9 Wigmore, *Evidence* § 2843 (3d ed. 1940)

Any excursion into evidentiary matters not presented by the parties is discretionary with a trial court, and a court of appeals should not disturb the trial court's exercise of that discretion unless it is abused. *Steinberg v. United States*, 162 F.2d 120 (5th Cir., 1947); *Smith v. United States*, 331 F.2d 265 (8th Cir., 1964). The district court considered all of the issues raised and evidence submitted by the plaintiff, and the plaintiff raised no issue and made no offer of proof as to Delta's employment policies on a nationwide basis, other than discharge. A remand to consider matters entirely beyond the scope of the pleadings and the evidence adduced by either party is an act contrary to the function of an appellate court in the American jurisprudential system.

Second, by directing the district court to make findings with

respect to issues which were never properly before it, the court of appeals has violated the concept of appellate review and has acted in excess of its powers. A court of appeals does not have the power to review matters outside the record or to direct that other matters should go into the record unless the district court has erroneously excluded evidence submitted by a party. Furthermore, a court of appeals will not rule on issues which were not raised in the pleadings or in the evidence in the district court or which have not been urged on appeal. *United States v. Tyrrell*, 329 F.2d 341, 345 (7th Cir., 1964); *Rish v. United States*, 272 F.2d 60, 61 (4th Cir., 1959); *International Business Machines Corp. v. Edelstein*, 526 F.2d 37, 46 (2d Cir., 1975). The action taken by the Sixth Circuit Court of Appeals in this case must be termed something other than appellate review since the court entirely disregarded the pleadings, the evidence adduced and the assignments of error on appeal. There is no support in the record for the court's action.

The intervention by the court of appeals into evidentiary matters is particularly inappropriate in this case because of the involvement of Rule 23 of the Federal Rules of Civil Procedure. The determination of the proper scope of a purported class is a matter peculiarly within the trial court's discretion. *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1123 (5th Cir., 1969); *Wright v. Stone Container Corp.*, 524 F.2d 1058, 1061 (8th Cir., 1975). Moreover, the question of whether to bring a suit as a class action, and if so, what class to represent is in the first instance a question for the plaintiff. No one is compelled to file his suit as a class action or to represent persons he does not wish to. The Rule 23 requirement of adequate representation prohibits McBride from representing persons in cities other than Memphis whose interests he has never even attempted to protect.

Under these circumstances the remand by the Sixth Circuit for a "reformulation of the scope of the class" is tantamount

to the action of the Fifth Circuit which was reversed by this Court last term in *East Texas Motor Freight System, Inc. v. Rodriguez*, ____ U.S. ____, 97 S.Ct. 1891 (1977). In that case the court of appeals had invaded the province of the district court by making a class certification at the appellate level. In this case the court of appeals has usurped both the district court's discretion to determine the scope of the purported class appropriate for consideration and the plaintiff's discretion to decide whom he wishes to represent.

This result cannot be tolerated in a Title VII action any more than in any other type of case. The provisions of Rule 23, the rules of evidence and the concept of appellate review apply with equal force in Title VII cases and other types of litigation. *See, e.g., East Texas Motor Freight System, Inc. v. Rodriguez, supra.* For these reasons your petitioner respectfully invokes the supervisory powers of this Court to overturn this improper decision of the Court of Appeals for the Sixth Circuit which grossly deviates from the normal course of judicial proceedings and from that court's appellate review function.

3. The Decision Below Conflicts with the Decision of this Court in *East Texas Motor Freight System, Inc. v. Rodriguez* as to the Representation of a Class by a Person who has Suffered No Discrimination.

The decision of the Court of Appeals in this case conflicts with the holding of this Court in *East Texas Motor Freight System, Inc. v. Rodriguez*, ____ U.S. ____, 97 S.Ct. 1891 (1977), decided during the last term of this Court. Despite the class allegations in the Complaint, the plaintiff did not move prior to trial for certification of a class pursuant to Rule 23, Federal Rules of Civil Procedure, and the district court did not certify a class. Thus, when McBride's individual claim was denied at the conclusion of the January 1974 hearing, the case

had not been certified as proper for class treatment.

McBride lacks all of the elements necessary to qualify him as a proper representative of *any* class of Delta employees or applicants for employment under the provisions of Rule 23 of the Federal Rules of Civil Procedure. The district court itself expressed misgivings about McBride's ability to represent any class but nevertheless allowed him to introduce further evidence on the class claims over the defendant's contention that the plaintiff was not entitled to represent a class in this case. (App. p. A-25). At the hearing on the class matters McBride was not personally present. The evidence shows that McBride was favored over other black and white employees in hiring and promotion, and McBride did not assert in his testimony that he personally had suffered from any discriminatory action other than the allegedly discriminatory discharge following his criminal conviction. In fact, McBride affirmatively testified that he was not denied promotion because he was black.

Under these circumstances a remand by the court of appeals to consider class certification conflicts with the ruling of this Court in *East Texas Motor Freight System, Inc. v. Rodriguez, supra*, where the Court stated:

> As this Court has repeatedly held, a class representative must be part of the class and 'possess the same interest and suffer the same injury as the class members.' *Id.*, 97 S.Ct. at 1896.

The district court ruled against McBride on his individual claim before any determination of the class claims. Furthermore, the court of appeals affirmed the dismissal of McBride's individual claim. Therefore, a remand to the district court to consider representation of a class by a person who "could have suffered no injury as a result of the alleged discriminatory practices, and [is], therefore, simply not eligible to represent a

class of persons who did allegedly suffer injury" is both futile and improper. *Id.* 97 S.Ct. at 1897. In accordance with the decision of this Court in *East Texas Motor Freight System, Inc. v. Rodriguez, supra*, the district court expressly held that it "has not found defendant guilty of any pattern or practice of racial discrimination since 1968, under all the circumstances at Memphis" and decreed that the Complaint "insofar as it asserts a claim on behalf of any class, is dismissed without prejudice." 2/ This result should not be disturbed.

2/ Contrary to the assertion of the majority opinion of the court of appeals, the district court nowhere "implicitly finds that there was a pervasive pattern of discriminatory employment practices at Delta" nor does the opinion of the district court state "that a grant of injunctive or other relief would be 'unwise.' " Rather, the district court expressly found that Delta was not guilty of discrimination and as a result that no relief was appropriate, and this ruling is supported by the substantial evidence in the record. This Court will not need to review this evidentiary question in connection with Delta's petition because, in any event, McBride is not an appropriate class representative with respect to those claims.

CONCLUSION

McBride is illogical and contrary to the decisions of the Courts of Appeals for the Third, Fourth, Fifth, Seventh and Ninth Circuits. It ignores the intent of Congress in enacting Title VII, the requirements of Rule 23 as set out in this Court's opinion in *East Texas Motor Freight System, Inc. v. Rodriguez* and principles underlying the court of appeals appellate review function.

In this Petition we have discussed the EEOC investigation and conciliation functions interchangeably as have the cases in most circuits. But nowhere have the courts clearly delineated the function of investigation or conciliation or the bearing of either upon the scope of a Title VII judicial complaint. These questions urgently require the attention of this Court.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August, 1977, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to A. G. Burkhart, Jr., 1016 Dermon Building, Memphis, Tennessee 38103, Counsel for Respondent. I further certify that all parties required to be served have been served.

William F. Kirsch, Jr.

WILLIAM F. KIRSCH, JR.
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Counsel for Petitioner

No. 75-1955

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JAMES MCBRIDE,
Plaintiff-Appellant,
v.
DELTA AIR LINES, INC.,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Western District of Tennessee.

Decided and Filed March 11, 1977.

Before: WEICK, EDWARDS, and MCCREE, Circuit Judges.

The Court delivered a per curiam opinion, in which WEICK, Circuit Judge, (pp. 5-15) filed a separate dissenting opinion.

PER CURIAM. James McBride appeals from the dismissal of his individual and class claims against Delta Air Lines. In his complaint he alleged that Delta had discriminated against him in particular and against black employees and black applicants for employment in general because of their race, in violation of 42 U.S.C. §§ 1981 and 2000e-2.

Delta had a national policy requiring dismissal for "conduct unbecoming a Delta employee," and regarded conviction of a crime as within that standard. In 1970, appellant was convicted of assault and battery on a Memphis policeman. Delta thereupon discharged McBride because of this rule and because of his spotty work record.

The district court found that "there was no discriminatory intent" motivating Delta's discharge of McBride. It also de-

termined, after comparing the race of all employees discharged because of the national policy about convictions with the race of all dischargees, that the national policy was not discriminatory in effect. Of course, an employment practice which is discriminatory in effect on the basis of race, sex, religion or national origin violates 42 U.S.C. § 2000e-2(a)(1) and (2). *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). But these determinations are supported by the evidence and are not erroneous. We therefore affirm the judgment of the district court insofar as it dismisses McBride's individual claim.

We do not believe, however, that the district court correctly applied our circuit standard expressed in *Tipler* v. *DuPont*, 443 F. 2d 125 (6th Cir. 1971), defining the scope of a class in a Title VII complaint. The district court's order does not make clear whether the class aspects of McBride's complaint were dismissed because no class could properly be certified, because the scope of the class would be more narrow than that which McBride had sought, because Delta had not violated 42 U.S.C. § 2000e-2, or because on the evidence presented no relief, injunctive or otherwise, was warranted for a violation of the statute.

In *Tipler*, we stated that the complaint filed by an aggrieved employee limits in some respects the scope of the class which may be certified in judicial proceedings. However, we held that the district judge should not restrict the scope of the class more narrowly than the ambit of the EEOC investigation that the individual's complaint might reasonably have been *expected* to stimulate. Because administrative complaints are filed by completing a form designed to elicit specificity in charges, and because the forms are not legal pleadings and are rarely filed with the advice of legal counsel, any other standard would unreasonably limit subsequent judicial proceedings which Congress has determined are necessary for effective enforcement of the legal standards established by

Title VII. See House Report No. 92-238, U.S. Code Cong. and Admin. News 2141, 2147-48 (1972).

McBride's complaint to the EEOC alleged that he had been discharged because of his race. The EEOC's *conciliation* effort might reasonably have been expected to be restricted to Delta's discharge policies, and perhaps even particularly to the conviction rule which, according to McBride, was racially discriminatory in effect. However, in order to determine whether the discharge policy was racially motivated or was racially discriminatory in effect, the *investigative* effort would certainly have required review of any racially discriminatory practices within Delta's large and complex personnel structure. Indeed, a pervasive pattern of discriminatory effects may support an inference of intentional discrimination underlying the individual charge of discriminatory firing. See *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 45 U.S.L.W. 4073, 4077 (1977). Therefore, the case must be remanded for a determination of the appropriate scope of the class in light of the *Tipler* standard.[1]

Furthermore, whatever may be the proper scope of the class, the district court's dismissal of the class claims on the merits is unwarranted. In its written opinion the court implicitly finds that there was a pervasive pattern of discriminatory employment practices at Delta when McBride's administrative and judicial complaints were filed. Nevertheless, it does not determine whether or not Delta has violated Title VII. Instead, the opinion states that a grant of injunctive or other relief would be "unwise." This determination may have been based in part on Delta's evidence of good faith efforts

[1] Of course, as in all class actions, any certification must conform to the requirements of Rule 23 of the Federal Rules of Civil Procedure. Because the district court did not reach this issue, we express no view as to the appropriate determination. We hold only that the *Tipler* rule does not require a separate determination equivalent to Rule 23(c) certification. To the contrary, the *Tipler* standard serves only to assure that the EEOC will have an opportunity to investigate the claims of the class before the complaint is brought.

to remedy the earlier discrimination, and in part on the difficulty of coordinating relief with the administration of a system-wide discrimination suit brought by the United States against Delta in the Northern District of Georgia. See *United States* v. *Delta Air Lines*, No. C-18175 (N.D. Ga., April 27, 1973).

We agree with the district court that an appropriate disposition should afford the Memphis employees the opportunity to have their claims of discriminatory employment practices at their terminal fully considered, should recognize the interest of Delta in avoiding inconsistent remedies or unnecessarily onerous liability, and should not interfere with the orderly implementation of the Atlanta system-wide decree. The procedures for multidistrict litigation, see 28 U.S.C. § 1407, may be useful in reconciling these objectives.

The case is therefore remanded for reformulation of the scope of the class, for findings of fact and conclusions of law on the charge that Delta has violated the rights of the class under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, and 42 U.S.C. § 1981, and for appropriate class remedies if a violation is found. The foregoing is without prejudice to the utilization of the procedures for multidistrict litigation, if the district court should in its discretion determine that those procedures would be useful.

WEICK, Circuit Judge, Dissenting. I would affirm the judgment of the District Court in its entirety. I regard McBride's claim for discriminatory discharge as frivolous, and the remand ordered by the majority opinion as wholly unnecessary.

McBride was employed by Delta as a Skycap in 1968. His employment came about as a result of the friendship and influence of his father with Delta's Memphis Terminal Manager. The following year McBride, who is black, was given a double promotion to the position of Cargo Service Agent, which was a responsible position, and in receiving the promotion McBride skipped the intermediate position of Cargo Service Supply Agent.

After receiving the promotion, however, his work product deteriorated. He had three accidents on company premises due to his negligence in operating a company vehicle, which negligence resulted in property damage. The District Judge, in his opinion, indicated that it was shown in several areas that McBride was accident prone. He further stated:

> A great deal of emphasis was given to the fact that in one of these accidents there was an alleged defective condition of brakes, which the Court feels was really immaterial to any question here. The condition of the brake of the object hit seems scarcely to the Court to be material to whether the person hitting it with another object was careless or not, and the proof and evidence, the Court feels, demonstrated that the carelessness occurred in the case of this employee and that we don't find that with respect to the time that Mr. McBride was employed by Delta that it has been established that there was discrimination practiced against him with respect to any discipline that may have been imposed by reason of these different episodes.
>
> It has also been shown that Mr. McBride, in connection with one of the accidents did fail to report the accident which involved a customer of the air line, and that this was a factor which fairly could be taken into account

> and was testified about by one of the supervisory officers in appraising Mr. McBride's trustworthiness in that respect.

In addition to his being accident prone, which is not a virtue for an airline employee whose employer is required by law to maintain at all times a high standard of safety for its passengers and crew, McBride was subject to discipline for being tardy and absent from work. Notwithstanding this poor employment record, Delta took no action to discharge him until after he had been convicted upon his plea of guilty and had served a sentence of a serious violent crime of assault and battery committed upon two police officers of Memphis, Tennessee.

On May 3, 1969, while off duty, and following an automobile accident in which he and his brother were involved, an altercation took place between McBride, his brother and the two police officers who were at the scene and were investigating the accident. One of the officers was white and the other was black. McBride and his brother, both of whom were intoxicated, attacked the two officers, injuring one of them. It was necessary to call out additional police cars to the scene in order to rescue the officers. No racial connotations were involved in this incident since the attack was upon both white and black arresting officers.

McBride was arrested and charged with assault and battery on the officers. Even this incident did not result immediately in his discharge. The company cautiously waited until after his trial before taking any action. McBride's criminal case did not come up for trial until a year later, *i.e.*, May, 1970, when he entered a plea of guilty to the charge and was sentenced to thirty days' imprisonment in the Shelby County Penal Farm. Delta's officials from its Georgia office then discharged McBride because of his conviction and sentence for the commission of a violent crime, and because of his poor

work record. This action was pursuant to its national policy permitting discharges for conduct unbecoming a Delta employee.

McBride then filed a charge with EEOC, which stated simply: "[T]he Company discharged me because of my Negro race."[1]

McBride filed a class action against Delta in the District Court, with a pauper's affidavit, although the District Court found that he had at that time secured other employment with substantial remuneration. In his complaint he alleged with respect to his personal claim:

> 1. The following policies, practices, customs and usages made unlawful by Title VII of the Civil Rights Act of 1964 have been instituted and/or maintained by the defendant, Delta Airlines, Inc.
>
> 2. (A) The defendant refuses to allow Negro employees to continue employment for defendant after said Negro employees have been convicted of a crime, felony or misdemeanor. The defendant has allowed and continues to allow white employees of said defendant's organization to continue employment after they have been convicted of a crime, felony or misdemeanor.

McBride also alleged discrimination in the hiring, promotion and seniority practices of the company, none of which were applicable to him.

His prayer was for injunctive and back pay relief for himself and for his class.

The only trouble with McBride's claim for discriminatory discharge was that it lacked evidentiary support and substantiality.

---

[1] The District Director of EEOC, who investigated the charge, adopted findings of fact, dated September 8, 1971, with respect to the Memphis Terminal, in which he listed six Caucasions who were discharged for misconduct and only one black, namely, McBride. Nevertheless, EEOC granted permission to sue.

As before stated, Delta had a system-wide rule providing for the dismissal of employees for "conduct unbecoming of a Delta employee." Under this rule the company considered conviction of a violent crime, such an assault and battery, to be conduct warranting discharge. Between January, 1970 and January, 1974, the time of the first hearing in the present case, Delta, system-wide, terminated the employment of 79 of its employees for conduct unbecoming of an employee; of these 79 employees 49 were white, and 30 were black. 17 employees, four of whom were black, were discharged for misconduct away from company property. Additionally, 15 of these 79 employees were convicted of a crime, and of these 15 employees 9 were white, 4 were black, one was Spanish-American, and one's status was unclear from the record.[2]

This does not prove a discriminatory discharge in any respect. To the contrary, many more whites were discharged for misconduct than were blacks. The record does not show that any of these whites ever filed charges with EEOC, alleging discrimination, nor did any of the blacks other than McBride.

The District Judge heard the evidence for three days, and at the conclusion of the evidence on January 4, 1974 he delivered an oral opinion which is set forth at length on fourteen pages of Appendix Vol. I. In his opinion the Judge made findings of fact and conclusions of law. He found that the national policy of Delta, providing for discharge of employees for conduct unbecoming a Delta employee, where criminal, or allegedly criminal, or immoral or wrongful conduct is involved, was a facially neutral policy and was not intentionally discriminatory in any respect. After detailing the evidence, which included the fact that Delta waited for a year until McBride was tried, convicted, sentenced, and had served his sentence, before discharging him, the Court held

[2] It is unclear from the record in which group the Spanish-American was included.

that he had not met his burden of proof required under 42 U.S.C. § 2000e-5 to establish that Delta had intentionally engaged, or is engaging, in an unlawful employment practice in regard to his discharge, and found in favor of the defendant. The Court continued for a further hearing the class action aspects of the case by a preliminary order entered on January 8, 1974.

On September 11, 1974 the District Judge entered another order in which he reaffirmed his previous order and again held, after further recitation of the evidence, that the policy of discharge in these circumstances was facially neutral and was carried out in a racially non-discriminatory fashion.

These findings of fact are supported by substantial evidence and are not clearly erroneous; in fact, no other conclusion could be reached without doing violence to established legal principles.

The Court continued the case further to permit counsel to respond to certain questions relating to the class action aspects of the case, including the applicability of the consent decree which had been negotiated with the Civil Rights Division of the Department of Justice and the Department of Labor in the pattern and practice action filed by the *United States* v. *Delta*, in the District Court in Atlanta, Georgia, dated April 27, 1973, Civil Action # 18175, which had system-wide application and had been availed of by employees at the Memphis Terminal.

The final hearing of the class action was conducted on December 20, 1974. McBride did not even attend that hearing: he apparently was no longer interested since his personal claim had been dismissed.

In an order entered on March 17, 1975 the Court, after discussing the evidence and the applicability of the consent decree in the Atlanta case, stated:

> The Court has discussed the class aspects of the complaint and considered relief only with respect to the prayer for general relief from racial discrimination as it

may affect other Delta employees besides McBride. No notice has been given in this case to potential class members, and the Court has made no F.R.C.P. 23 determination that it should be constituted as a class action. There has been considerable doubt that McBride is an appropriate class representative except with regard to those who may claim to have been discharged improperly by reason of race during the relevant period here involved. The E.E.O.C. investigation on the simple and concise charge that "The company discharged me because of my Negro race" would evidently and logically be confined to terminations only.[1] Appropriate consideration of the charge made should consistently then be limited to discharge situations, not those dealing with promotions, seniority systems, bidding, transfer and hiring policies. *Sanchez* v. *Standard Brands*, 431 F.2d 455 (5th Cir. 1970); *Oatis* v. *Crown Zellerbach*, 390 F.2d 496 (5th Cir. 1968); *E.E.O.C.* v. *New York Times, d/b/a WREC-TV*, 364 F.Supp. 651 (W.D. Tenn. 1973). See also *Tipler* v. *DuPont*, 443 F.2d 125 (6th Cir. 1971).

[1] This is borne out by the District Director's findings and [sic] fact dated September 8, 1971, in McBride's case.

The Court then entered a final order dismissing, with prejudice, McBride's personal claim and dismissing, without prejudice, the alleged class action.

There are two very good reasons supporting the District Court's order. First, the only charge ever filed by McBride with EEOC was the one in which he stated, "The company discharged me because of my Negro race." The charge filed by McBride with EEOC caused EEOC to investigate only his discharge. That matter was investigated by the Regional Director of EEOC, and he adopted the findings of fact hereinbefore quoted in footnote 1, indicating that there was no basis for the charge.

EEOC had no reason to investigate the hiring, promotion and seniority practices of a national airline throughout its

entire system, because no charge had ever been filed with it that would reasonably cause it to make such an extensive investigation.

In *Tipler* v. *E. I. duPont deNemours & Co.*, 443 F.2d 125 (6th Cir. 1971), the Court, in an opinion written by the late Judge William E. Miller, recognized that "the complaint in the judicial proceedings is only limited to the scope of the E.E.O.C. investigation reasonably expected to grow out of the charge of discrimination." Authority for this statement cited and relied on by the Court was *Sanchez* v. *Standard Brands*, 431 F.2d 455 (5th Cir. 1970), and *King* v. *Georgia Power Co.*, 295 F.Supp. 943 (N.D.Ga. 1968). *Cf. Marlowe* v. *Fisher Body*, 489 F.2d 1057, 1064 (6th Cir. 1973).

In *Sanchez, supra*, the Court said:

> Thus within the statutory scheme, it is only logical to limit the scope of the civil action to the scope of the E.E.O.C. investigation which can reasonably be expected to grow out of the charge of discrimination. (*Id.* 466)

In *King, supra*, the Court stated:

> This rule, broadly speaking, in effect limits the civil action to that range of issues that would have been the subject matter of the conciliation efforts between EEOC and the employer. If the civil action were not so limited, then the primary emphasis of this Title would be circumvented, i.e., an emphasis upon voluntary settlement of all issues without an action in the District Court. (*Id.* 947)

See also E.E.O.C. v. *National Cash Register Co.*, 405 F.Supp. 562, 567 (N.D.Ga. 1975), and the cases cited therein; *E.E.O.C.* v. *Western Elec. Co.*, 382 F.Supp. 787, 799 (D. Md. 1974); and *Kinsey* v. *Legg, Mason & Co.*, 60 F.R.D. 91, 97 (D.D.C. 1973).

When McBride complained to EEOC he limited his claim solely to his discharge. To expand this single issue into practices as different and diverse from discharges as those relative to hiring, promotions, and seniority practices over its entire

system, which practices did not apply to McBride, would be unfair to Delta. The company would hardly expect to be put under a microscopic investigation of all of its hiring, promotion, and seniority policies in its nationwide organization, merely because of a neutral company discharge rule governing all employees irrespective of race, which rule had been applied to only one employee in its Memphis terminal, because of his conviction of a violent crime.

One would reasonably expect EEOC to investigate the charge of racial discrimination in McBride's discharge, which it did, and to direct its conciliation efforts in that direction. The rule is an objective standard applied by the company throughout the entire area which it serves. No matters of hiring, promotion or seniority were really at issue here; either the company rule was valid, or it was not.

"[A] class action must proceed within the bounds of the issues properly raised by the plaintiff . . . representing the class." In a Title VII class action only those issues raised before the EEOC "delineate the scope of the issues which may properly be raised in the subsequent lawsuit." *Smith* v. *North American Rockwell Corp.*, 50 F.R.D. 515, 524 (N.D.Okla. 1970). *See also Oatis* v. *Crown Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968).

Second, even though a single charge of employment discrimination may be sufficient, under some circumstances, to initiate a broader inquiry into the employer's employment practices of a similar nature, "the district court is vested with some discretion in determining the parameters of the class." *Green* v. *Missouri Pac. R.R.*, 523 F.2d 1290, 1299 (8th Cir. 1975). Only an abuse of this discretion by the District Judge should change the proper scope of the class, *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122, 1123 (5th Cir. 1969), and *Wright* v. *Stone Container Corp.*, 524 F.2d 1058, 1061 (8th Cir. 1975), "because the district court is in the best position to consider the most fair and efficient procedure for conducting

any given litigation." *Price* v. *Lucky Stores, Inc.*, 501 F.2d 1177, 1179 (9th Cir. 1974).

Under the circumstances of this particular case it is clear that the District Judge did not abuse his discretion in determining the scope of the class to be employees whose employment was terminated, and his findings should not be disturbed. *Green* v. *Missouri Pac. R.R.*, *supra*, at 1299.

The District Court was correct in questioning the propriety of McBride, who was convicted and served a sentence for the commission of a violent crime, acting as representative of a class of employees having complaints in which McBride did not share, with respect to hiring, promotion and seniority practice. McBride had nothing in common with their complaints as he had been treated differently by Delta. He had received a double promotion and would be working for Delta today if he had not pleaded guilty to and was convicted and served a sentence for a violent crime. Delta ought not to be faulted for getting rid of accident prone, tardy and absentee persons who commit violent crimes, irrespective of their race. The public would not stand for being served on airplanes by such employees who might endanger their own lives and the lives of the passengers.

As was well stated by the Supreme Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430-31 (1971):

> In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

The Court dismissed the class action without prejudice. No other employee sought to intervene.

There is no point in remanding the case to the District Court as ordered by the majority, for "findings of fact and conclusions of law on the charge that Delta has violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 and 42 U.S.C. § 1981 and for appropriate remedies if a violation is found." In my opinion the District Judge has already adopted such findings of fact and conclusions of law in his original opinion and order of January 4 and 8, and orders of September 11, 1974 and March 17, 1975. He found specifically that McBride's discharge was not discriminatory, but was because of his conviction and sentence for a violent crime, and because he was accident prone, tardy and absent. We should not require the Court to do its work all over again, particularly since the majority appears to concede that the findings of the Court supported the judgment in favor of Delta on McBride's personal claim.

It also appears that the Memphis employees already have "the opportunity to have their claims of discriminatory practices at their terminal fully considered . . ." by the Atlanta court, and a number of them already have done so. It is therefore not necessary for us to remand for any such purpose. We applied a similar consent decree in *Martini* v. *Republic Steel Co.*, 532 F.2d 1079 (6th Cir. 1976). There can be no purpose served in having two class action proceedings.

As to racial impact, the Supreme Court in *Washington* v. *Davis*, 426 U.S. 229, 239 (1976), stated:

> . . . [O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.

The bringing of this action by McBride was clearly a misuse of the Civil Rights Act. This suit has been extensively litigated

over a period of years and has no doubt already subjected Delta to considerable expense. If such practice continues to abound no employer could safely risk refusing to hire, or to discharge, any person of a minority group, even for a valid reason, unless it desired to defend itself in costly litigation. *Griggs* v. *Duke Power Co.*, *supra*, does not sanction any such practice. The Court is simply not following *Griggs* here.

The doctrine of respondeat superior is based on the right of an employer to select his own employees, or to discharge them if no contract is involved. If an employer no longer possesses this right, then the time-honored doctrine of respondeat superior ought to be re-examined.

District Judge Harry Wellford handled this extensive litigation, along with many other cases on his docket, in a careful, deliberate and patient manner. He even "leaned over backward" when he allowed McBride's lawyer an attorney's fee of $500, to be paid by Delta, although McBride had not prevailed and such allowance of fee was unauthorized. It is time to write finis to this unsubstantial and needless litigation.

The judgment of the District Court should be affirmed.

NO. 75-1955

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED: June 3, 1977

JAMES McBRIDE,
Plaintiff-Appellant,

vs.

DELTA AIR LINES, INC.,
Defendant-Appellee.

ORDER

Before: WEICK, EDWARDS and PECK, Circuit Judges.

On receipt and consideration of a motion for rehearing and a suggestion for rehearing in banc; and

The majority of the actives judges in this court not having voted for rehearing in banc and the petition having been referred to the panel which heard the case, with Judge Peck assigned by the Chief Judge to replace Judge McCree on said panel; and

Noting no issue presented by said motion for rehearing which had not been thoroughly considered by the panel in advance of issuance of the opinion,

Now, therefore, with Judge Weick adhering to his dissent, the petition for rehearing is denied.

Entered by order of the Court

John P. Hehman
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

FILED: April 16, 1973

JAMES McBRIDE,
Plaintiff,

vs. NO. C-72-339

DELTA AIRLINES, INC.,
Defendant.

ORDER

Plaintiff has filed this class action alleging that the defendant is guilty of racially motivated discriminatory employment practices. Defendant has moved to strike portions of plaintiff's complaint, or in the alternative, for a more definite statement on the basis that many of plaintiff's allegations as contained in his complaint are beyond the scope of and not encompassed by the charge filed by plaintiff before the Equal Employment Opportunity Commission.

Upon careful consideration, the Court is disposed to deny defendant's motion. A single broad charge of employment discrimination under Title VII found by the E.E.O.C. to rest upon reasonable grounds may serve under appropriate circumstances for a full scale inquiry into the alleged unlawful pattern and practice. *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970). Allegations contained in a complaint, moreover, charging unfair employment practices

are not necessarily limited to the exact description of charges as originally filed with the E.E.O.C. Like or related illegal practices to those contained in original charges or growing out of such allegations during pendency of the case before the Commission, as set out in *King v. Georgia Power Co.*, 295 F.Supp. 943 (N.D. Ga. 1968) may be considered. All such matters may be reconsidered at a later stage or at pre-trial. The Court, therefore, denies defendant's motion to strike.

A motion for more definite statement is addressed to the sound discretion of the Court and will not be granted unless the defendant cannot reasonably be expected to frame a responsive pleading. *Robinson v. Penn Cent. Co.*, 336 F.Supp. 658 (E.D. Pa. 1971). Such motions are not favored, however, since discovery is a far better means to achieve defendant's objectives. The Court, therefore, denies defendant's motion for a more definite statement.

Accordingly, it is ORDERED that defendant's Motion to Strike, or, in the Alternative, For a More Definite Statement be, and the same is, denied.

s/ Harry W. Wellford
UNITED STATES DISTRICT JUDGE

Date: 4/16/73

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

FILED: January 8, 1974

JAMES McBRIDE,
Plaintiff,

vs. NO. C-72-339

DELTA AIRLINES, INC.,
Defendant.

ORDER

At the conclusion of the hearing in this cause on the case of James McBride personally vs. Delta Airlines, the matter being submitted subject to further proof on the class action aspects of this case, the Court rendered on oral opinion to the effect that the plaintiff, James McBride, had failed to carry his burden of proof of establishing against the defendant Delta Airlines that the said defendant has engaged, or is engaging in an unlawful employment practice with respect to his discharge.

A final order will be entered pertaining to Mr. McBride's case and to the class action aspect of this case, however, at a subsequent time after the parties have had an opportunity to submit memoranda pertaining to the class aspects of this case.

This 8th day of January, 1974.

s/ Harry W. Wellford
UNITED STATES DISTRICT JUDGE

1-8-74

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

FILED: September 11, 1974

JAMES McBRIDE,
Plaintiff,

vs. NO. C-72-339

DELTA AIR LINES, INC.,
Defendant.

ORDER

After a hearing in this suit based upon asserted violation by defendant airlines of plaintiff's right to equal employment and equal employment opportunities without racial discrimination, the Court entered a preliminary order denying relief to plaintiff personally for failure to carry his burden of proof. The parties have filed supplemental memoranda, and upon the entire record in the cause, the Court enters this Order as dispositive of the cause of action with respect to the class action aspect. The United States District Court at Atlanta, the home office of defendant, entered an order dated April 16, 1973, Civil Action No. 18175 in an action brought by the United States against Delta and determined certain remedies available to black employees affected by Delta's practices with regard to employment and future opportunities with that employer. The provisions of that order,

incorporating an approved agreement, were subject to election on the part of those black employees who were in the class covered.

The Court found in McBride's case that he had been promoted in 1969, to the position of cargo service agent (previously a classification composed almost entirely of whites) from the status of skycap, which has traditionally been almost exclusively black. A little more than a year later in 1970, he was discharged following his conviction and sentencing for an alleged off-duty assault upon a Memphis Policeman or Policemen. He claimed the discharge to be based on his race. In fact, Delta has had a policy of discharging any employee convicted of a charge of this character, whether or not the illegal, or allegedly illegal, act occurred while the employee was actually "on the job." At the time of discharge, McBride had experienced three accidents attributable to a greater or lesser degree to his negligent or careless conduct. He was not, then, a man with a highly commendable record at the time of his termination, which the Court found to be essentially non-discriminatory in its nature. A minority of employees discharged by Delta in a relevant period before the trial of this cause on the policy in controversy were black.[2] The policy of discharge in these circumstances was facially neutral and was carried out in a racially non-discriminatory fashion. Indeed, plaintiff testi-

1. McBride was hired initially as a skycap in 1968.

2. The E.E.O.C. District Director's findings of fact found Delta's list of terminated employees in Memphis showed six caucasians discharged for misconduct compared to only one black, McBride.

fied that another black employee with a criminal conviction was not discharged by Delta, and that another employee with a similar accident record, also a black, was not discharged. It is true that the percentage of assaults, for criminal statistics purposes, both in Memphis and nationally was about three times the proportion of blacks to the total population (except in suburban or rural areas).

There was other testimony in the record to the effect that Delta at the time of McBride's discharge, had a relatively low proportion of blacks in the more skilled and higher paying jobs. From the time that McBride had been hired, however, Delta had improved its statistical and actual performance with respect to hiring and promoting blacks, even in departments hitherto entirely or almost entirely white. Delta carried out a policy of testing in some areas, but Mc Bride had evidently taken and passed the tests to be eligible for his promotion. Some departments, however, at the date of trial were still very predominantly white in their make-up.

Defendant urges that the class action aspect of the case be now dismissed because McBride has been found not to be a proper representative of a class of present or past black employees allegedly discriminated against, and because the Atlanta decree provides a means of relief for these employees, if any, at Memphis.

Without ruling definitively at present on this aspect of this cause of action, the Court will designate a further time to permit counsel to show:

1. Whether there are black employees in the air passenger, ticket personnel, cargo service, concourse agent, ramp,

air freight and supervisory departments who were discriminated against during the relevant period at Memphis.

2. Whether any of the affected blacks at Memphis have elected to accept the relief provided for in the Atlanta decree.

3. Whether this Court should provide any general or affirmative relief in view of the facts and evidence adduced in this cause for the benefit of any alleged appropriate class of black Delta employees at Memphis, particularly in light of the agreement incorporated in the said Atlanta federal District Court Order; and *Blackburn v. Delta Air Lines*, No. C-72-1226 (N.D. Cal. 2-4-72), and *Smith v. Delta Air Lines*, No. C-70-954 (N.D. Ala, 1973).

Defendant may respond in 30 days from this date to any of the three areas above indicated in which the plaintiff's counsel may seek to discover or present proof or submit a memorandum. The Court does note that it would appear doubtful that McBride is a proper class representative for any allegedly affected black employees of Delta at Memphis under the circumstances. Plaintiff's counsel may, however, have a period of 30 days to indicate whether he will attempt and proceed to discover and/or produce additional proof under the standards and limitations herein prescribed, other than the testimony submitted of Joe Isom and Grover Odom.[3] The Court is also mindful that other aggrieved Delta individuals, if they assert or allege racial discrimination without the fear of lawful retaliation, may in proper cases file charges with E.E.O.C. and under the 1972 amendments to the Civil Rights Act be represented in court by that agency after investigation and efforts to conciliate

3. Defendant may also, of course, respond to plaintiff's indicated submission under this Order under the Federal Rules of Civil Procedure.

the differences. To dismiss this action, then, would not prejudice their rights, if any.

This day of September, 1974.

s/ Harry W. Wellford
UNITED STATES DISTRICT
COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

FILED: March 5, 1975

JAMES McBRIDE,
Plaintiff,

vs. **NO. C-72-339**

DELTA AIR LINES, INC.,
Defendant.

ORDER

Following this Court's order finding plaintiff McBride individually to have failed in his racial discrimination claim against Delta Air Lines (hereinafter Delta), further proof and evidence, as well as memoranda and argument, have been submitted on the racial discrimination class action claims inherent in this complaint under Title VII of the 1964 Civil Rights Act. This matter has been considered in light of an affirmative action agreement having system-wide application by Delta negotiated with the Civil Rights Division of the Department of Justice incorporated in a consent order dealing with alleged racial discrimination, *U.S.A. v. Delta Air Lines* (No. C-18175, N.D. Ga., 4-27-73).

Statistics elicited from Delta on discovery have indicated a low ratio or utilization of blacks in certain departments at the Memphis terminal, with which this Court is concerned in this case. After the enactment of Title VII of the

1964 Civil Rights Act, Delta with respect to its Defense Department relationship initiated an affirmative action program to hire blacks in otherwise white, or almost entirely white, categories. By approximately 1971, testing (such as was required of and satisfied by McBride) was discontinued and some educational requirements were eliminated by reason of their disparate impact on blacks. During the period in question to be examined under the McBride complaint, 1969 approximately through 1971, recessionary pressures adversely affected Delta nation-wide as well as at Memphis. Relatively little new hiring took place, and the Delta Memphis terminal was a place of stable employment with little turnover in personnel. More recent years in the airline industry have been influenced by the fuel shortage, allocations, and in some instances by lay-offs rather than growth in employment. During certain peak work times and during heavy travel months in 1973 and 1974, however, Delta initiated a business practice at Memphis of hiring part-time employees with no seniority and without usual fringe benefits of regular employees. Promotions from part-time positions to regular positions have been made almost in equal number from blacks and whites. Overall, the percentage of black employees over the past several years has improved perceptibly.

Plaintiff, however, points to the fact that a number of departments in Memphis still remain predominantly white or all white, and that the skycap department is all black, (including, however, a black supervisor) and that cabin clean-up division of customer service is overwhelmingly black. Ten black employees at Memphis have been paid awards or benefits under the Atlanta decree (as of January

5, 1975) hereinabove referred to, a total of $2800.00. Plaintiff points particularly to what formerly were referred to as air passenger agents, ticket counter personnel, concourse agents, ramp agents and the air freight personnel with respect to class action aspects of the suit indicative of racial discrimination. In these areas, plaintiff's attorney has pointed to evidence which assertedly shows proportionately few blacks, disparate pay, and effects of a seniority system that purportedly perpetuate alleged discriminatory treatment of blacks at Memphis.

New permanent openings filled in the Memphis terminal since 1973 have been few, but at least one-half have been black. All employees on the ramp, at the gate, or in the ticket office have been equalized in status and pay and are now designated customer service agents. This has had the effect of raising the pay of more blacks proportionately than whites. In some instances transfer from ramp to ticket counter has been accomplished, now a lateral transfer instead of a promotion. A system-wide bid system has been initiated under the Atlanta decree designed for more minority opportunity but this has not been particularly effective to date in Memphis due to the fact that few openings have been available. The import of the Delta plan incorporated in the aforesaid Atlanta decree, however, is to give blacks at least a limited priority in bidding on promotions and advancements along with females. Those testifying for plaintiff expressed disappointment in their failure to advance from or to customer service agent status and in respect to unsuccessful bids submitted for openings which they considered advancements. In all but two instances, however, out of some ten bids submitted by them, positions were filled by other blacks or females with greater seniority. The Delta plan therefore seems to be working

for black advancement, albeit slowly. A considerable majority of blacks at the Delta Memphis terminal submitting bids since that decree have succeeded in gaining advancement, and for the most part, those unsuccessful were defeated by other black or female bidders.

One area of concern to plaintiff's attorney was that relating to senior customer service agent, a higher paying position achieved not by seniority but by merit from customer service agent status. One-half of the blacks in that category have been advanced to senior status, whereas a lower proportion (but a greater number) of whites were so advanced according to the evidence submitted. Also, a black has subsequent to McBride's claim been advanced to a position of customer service agent supervisor.

Approximately one-third of the temporary employees hired during 1973 and 1974 have been black, a higher percentage than the black ratio of regular employees. These temporary employees have opportunities to bid on openings under the Delta Plan aforementioned. Only two supervisors at the Delta Memphis terminal are black, but this is a significant advancement over conditions at the time of McBride's termination. Only by replacement, lay-off, or demotion of white employees could present ratios be improved, except by reason of gradual attrition, resignations, and hoped-for future growth.

Salary differentials shown are found to be the result of annual increments due to in-service seniority in a particular position or category. Because blacks generally have not been employed as long as whites in these salary categories, they are paid slightly less, on the average, than are whites. The base salaries, however, are not fixed unequally or discriminatorily as to blacks. Plaintiff's attorney contends, however, that full seniority should be recognized using as a

base the time of hire so that blacks advanced from skycap to customer service agent, for example, would be entitled to salary increments as customer service agent based upon skycap experience. A Delta employee is, however, given one year's credit for each two year's service in lower paying positions so that in the example above given, a customer service agent promoted from skycap would receive annual "seniority good service" increments based upon one-half of his years experience as skycap. This is a policy applied equally, is facially neutral, and the Court does not find it to be discriminatory in effect.

The Court has discussed the class aspects of the complaint and considered relief only with respect to the prayer for general relief from racial discrimination as it may affect other Delta employees besides McBride. No notice has been given in this case to potential class members, and the Court has made no F.R.C.P. 23 determination that it should be constituted as a class action. There has been considerable doubt that McBride is an appropriate class representative except with regard to those who may claim to have been discharged improperly by reason of race during the relevant period here involved. The E.E.O.C. investigation on the simple and concise charge that "The company discharged me because of my Negro race" would evidently and logically be confined to terminations only.[1] Appropriate consideration of the charge made should consistently then be limited to discharge situations, not those dealing with promotions, seniority systems, bidding, transfer and hiring policies. *Sanchez v. Standard Brands*, 431 F.2d 455

1. This is borne out by the District Director's findings and fact dated September 8, 1971, in McBride's case.

(5th Cir. 1970); *Oatis v. Crown Zellerbach*, 390 F.2d 496 (5th Cir. 1968); *E.E.O.C. v. New York Times, d/b/a WREC-TV*, 364 F.Supp. 651 (W.D. Tenn. 1973). See also *Tipler v. DuPont*, 443 F.2d 125 (6th Cir. 1971).

The Court declines to issue injunctive or other relief on the basis of these findings, nor can it determine that this should be construed as a proper class action case. The Court has, however, encouraged plaintiff's attorney to develop the issues herein discussed as they may reasonably have related to the complaint and appreciates that much time and service has been dedicated by both counsel in this important case. Even though judgment is awarded to the defendant on the merits, for equitable purposes, and because some practices of defendant at least on the basis of statistical information have evidenced a possible past course of racial discrimination, the Court will award plaintiff's counsel a modest attorney fee. This is unusual, it is recognized, since the Court has not found defendant guilty of any pattern or practice of racial discrimination since 1968, under all the circumstances at Memphis.

Relief, of course, may still be available to Delta Memphis black employees under the Atlanta Court's decree. Plaintiff and his attorney have served a useful purpose in acquainting black Delta employees here of their further opportunities in this and other respects. Mr. Burkhart is ordered, accordingly, a fee of $500.00 for his services. Each party will bear his or its own costs. Plaintiff's cause of action is dismissed (without prejudice, however, as to any other purported class member).

This day of March, 1975.

s/ Harry W. Wellford
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

FILED: March 17, 1975

JAMES McBRIDE,
Plaintiff,

vs. **No. C-72-339**

DELTA AIR LINES, INC.,
Defendants.

FINAL DECREE

This cause came on to be heard before the Honorable Harry W. Wellford, Judge for the Western District of Tennessee, Western Division, upon the Complaint heretofore filed by the Plaintiff, James McBride, and the Answer of the Defendant, Delta Air Lines, Inc., and it appearing to the Court, as more fully set forth in the opinions of this court dated September 11, 1974 and March 5, 1975, which opinions are incorporated herein by reference, that the individual action of the Plaintiff, James McBride, alleging racial discrimination against the Defendant, Delta Air Lines, Inc., should be dismissed with prejudice and that the class action aspect of this case should be dismissed without prejudice;

And, it further appearing to the Court that A. G. Burkhart, Jr., should be awarded the sum of $500.00 for his services in the cause, and that each party hereto shall bear his or its own costs;

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the Complaint of the Plaintiff, James McBride, insofar as it asserts a claim of discrimination against the Plaintiff personally, is hereby dismissed with prejudice, and, insofar as it asserts a claim on behalf of any class, is dismissed without prejudice;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant, Delta Air Lines, Inc., pay the Attorney for the Plaintiff, A. G. Burkhart, Jr., the sum of $500.00 and that each party hereto bear his or its own costs for which let execution issue.

s/ Harry W. Wellford
JUDGE

APPROVED:

s/ A. G. Burkhart, Jr.
Attorney for Plaintiff

s/ William F. Kirsch, Jr.
Attorney for Defendant

CHARGE OF DISCRIMINATION

If you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's Regional Office in your area. In most cases, a charge must be filed with the EEOC within a specified time after the discriminatory act took place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE.

This form is to be used only to file a charge of discrimination based on RACE, COLOR, RELIGION, SEX, or NATIONAL ORIGIN.

Case File No. TNIEI-0017

(PLEASE PRINT OR TYPE)

1 Your Name (Mr., Mrs., Miss) James McBride
Phone Number 942-4001 (Mother)
Street Address 956 Wellington, Apt. No. 3
City Memphis State Tennessee Zip Code 38126

2 WAS THE DISCRIMINATION BECAUSE OF: (Please check one)
Race or Color [X]
Religious Creed [ ]
National Origin [ ]
Sex [ ]

3 Who discriminated against you? Give the name and address of the employer, labor organization, employment agency and/or apprenticeship committee. If more than one, list all.
Name Delta Air Lines Incorporated
Street address Memphis International Airport
City Memphis State Tennessee Zip Code
AND (other parties if any)

4 Have you filed this charge with a state or local government agency?
Yes [ ] When
MONTH DAY YEAR
No [X]

5 If your charge is against a company or union, how many employees or members?
Under 25 [ ]
Over 25 [X]

6 The most recent date on which this discrimination took place:
Month May Day 3 Year 1970

7 Explain what unfair thing was done to you. How were other persons treated differently? (Use extra sheet if necessary.)

The company discharged me because of my Negro race.

8 I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.
Date 7/13/70 s/ James E. McBride
(Sign your name)

Subscribed and sworn to before me this 13th day of July 1970

s/ Winfred R. Cravens Equal Employment Officer
(Name) (Title)

If it is difficult for you to get a Notary Public to sign this, sign your own name and mail to the Regional Office. The Commission will help you to get the form sworn to.

RECEIVED: July 13, 1970
EEOC
Memphis Area Office

FORM APP.: BUR. OF BUDGET - No. 124 - R0001

FORM EEOC-5 (REV. 7-68)

Equal Employment Opportunity Commission
46 North Third Street, Suite 1004
Memphis, Tennessee 38103

DISTRICT DIRECTOR'S FINDINGS OF FACT

In Re:

James McBride
Charging Party Case No. YME2-043

vs.

Delta Air Lines, Inc.
Memphis, Tennessee
Respondent

Date of alleged violation: May 3, 1970
Date of filing of charge: July 13, 1970
Date of service of charge: June 29, 1971

SUMMARY OF CHARGE:

Charging Party alleges that Respondent has engaged in an unlawful employment practice in violation of Title VII of the Civil Rights Act of 1964 by discharging him because of his Negro race.

JURISDICTION:

The charge was filed with the Commission on July 13, 1971 within the time limitations prescribed by Title VII.

Respondent is engaged in air transportation affecting interstate commerce.

Respondent employed approximately 381 persons at the time of the investigation. Of that number approximately 42 or (11%) are Negro.

SUMMARY OF CONTENTIONS AND EVIDENCE:

1. It is undisputed that Charging Party was employed by Respondent as a Cargo Station Porter on November 1, 1968 and continued there until he was terminated on May 2, 1970.

2. Charging Party alleges that Respondent discharged him because of his Negro race.

3. In a written statement of position dated July 16, 1971, Respondent's Administrative Assistant states that Charging Party was discharged for conduct unbecoming of a company employee.

4. Respondent's Administrative Assistant stated in his statement of position that Charging Party was a satisfactory employee and that Charging Party was promoted to Cargo Service Agent February 16, 1969.

5. Respondent's Administrator stated in a position letter dated July 16, 1971 that Charging Party was convicted on May 8, 1970 of assaulting a police officer, fined and sentenced to 30 days in the local penal farm.

6. Respondent's Administrator stated that Charging Party was permitted to continue his employment with the company from the time of his arrest and until the time of his conviction.

7. Respondent's Administrator further stated that the

company sets a standard of conduct for its employees commensurate with its status as a public carrier with an obligation by law to meet the public convenience and necessity.

8. Respondent's Standard Practice regulations, which is is given to all employees indicates on page 3, under "Policy" that:

> "An employee whether on or off duty is a reflection of Delta and may be subject to disciplinary action if his conduct brings an unfavorable reflection upon the company. Delta has no desire to interfere in personal affairs of employees and will not do so unless it is necessary. Outside business activities which tend to reduce the employee's attention, efficiency, or energy on his Delta job; reduce his availability for duty; or which adversely affect Delta or his relationship with Delta are prohibited.

9. Respondent's termination report shows that Charging Party was terminated for assaulting a police officer.

10. Respondent's list of terminated employees shows that six Caucasians were discharged for misconduct compared to one Negro, who is Charging Party.

11. The Tennessee Department of Employment Security Board Review stated that Charging Party was discharged for misconduct.

12. Charging Party stated at the time of filing his charge that a Negro employee who served a sentence was given his job back.

13. Respondent's Administrative Assistant states in his position statement that, "This is true. However, the other employee, a black, was convicted and sentenced for an incident which had occurred at least one year prior to becoming employed by Delta. In addition, the nature of his offense was less serious than that which Charging Party committed."

s/ Charles A. Dixon,
Charles A. Dixon,
Deputy Director

9/8/71
Date

SECTION 706(a) THROUGH (g), CIVIL RIGHTS ACT OF 1964, AS AMENDED; 42 U.S.C. § 2000e-5 (a) THROUGH (g)

(a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of sub-

sections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State

or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or

to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action

under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public imprtance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action

for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of

the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused employment or advancement or was suspended

or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

RULE 23(a) THROUGH (d), FEDERAL RULES OF CIVIL PROCEDURE

CLASS ACTIONS

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the rerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified

through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties

or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

Supreme Court, U. S.
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IN THE

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OCTOBER TERM, 1977

No. 77-336

DELTA AIR LINES, INC.,
Petitioner,

VERSUS

JAMES McBRIDE,
Respondent.

PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION

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Petitioner, Delta Air Lines, Inc., replies to the Respondent's Brief in Opposition to Petition for Certiorari as follows:

Respondent McBride has failed to respond to the issues presented in Delta Petition for Certiorari. Instead, he has constructed his own questions (Opposition, pp. 1-2) which do not meet the questions presented by Delta in its Petition.

I.

Prior to filing his Brief in Opposition McBride had not at any time during the course of this litigation manifested an interest in Delta employment practices outside the Memphis terminal. Neither in his pleadings, his oral or written argument, nor through evidence sought to be introduced has he asserted that he represented blacks at other Delta facilities. However, in an effort to support the suggestion of the court of appeals that this case be remanded for consideration of Delta employment practices on a *systemwide* basis, McBride in his Statement of the Case now asserts for the first time that he does have an interest in employment practices outside the Memphis terminal.

The Brief in Opposition states that fellow employees of McBride testified "at some length as to the current discrimination continuing at the Memphis airport *and otherwise in Delta in the other cities in the South.*" This is simply not the case. No witness for McBride was qualified to testify concerning employment practices outside the Memphis terminal, and none attempted to do so. If the

concept of adequate representation required by Rule 23 of the Federal Rules of Civil Procedure is to have any meaning, a party cannot following appeal become a representative for purported class members when he asserted no claim in their behalf in his pleadings, during the trial, or in the court of appeals. Having progressed through the entire trial and appellate process without challenging Delta's systemwide employment policies and having failed in his attempts to establish discrimination on the local terminal level, McBride cannot now be permitted to shift his ground in order to salvage his case.

II.

In an effort to sidestep the important questions raised in Delta's Petition, McBride has framed an entirely new issue which attempts to portray the review sought in this Court as a factual review of Delta employment statistics, but no such review is sought here since such questions come into play only if McBride is a proper class representative and may properly make such claims. McBride has leveled an attack against the alleged low utilization of blacks in Delta's work force. However, he has chosen to ignore the great strides which Delta has made at the Memphis terminal in the advancement of blacks to higher paying positions despite relatively static work force requirements resulting from slack economic conditions and erratic traffic volume patterns.

While Delta has been able to avoid layoffs during periods of low traffic volume, it has not needed to expand its work force. Nevertheless, changes in positions at Memphis during 1974 through hiring, layoffs and transfers resulted in an addition to Delta's Memphis work force of twenty-seven persons, with blacks accounting for thirteen of this increase, or 48.17 per cent. As to promotions

in the Memphis area, black terminal employees gained eleven out of twenty available slots, or 55 per cent of available openings.

An examination of the table of bids at the Memphis terminal for 1974 reveals that out of eighteen blacks who filed bids during 1974, three were defeated in each of their bids solely by other competing blacks, three others lost to a combination of blacks and whites, and eleven were successful in gaining advancement as sought. (Trial Exhibit 29.) Most significantly, the only Memphis terminal employee who has advanced to a supervisory position since 1969 is a black.

McBride has further erroneously asserted that no black makes more than a white "in a comparable circumstance." Delta has a basic pay rate for each job position with pay being based upon a combination of years of Company service and years of service in grade. This policy is applied neutrally to all blacks and whites, and the payroll records of November 1975 show that where blacks have greater service in grade they receive higher pay than whites with less time in grade. (Trial Exhibit 32.) Thus, even if the term "comparable circumstances" is taken to require the discounting of seniority pay increases, the record shows that a number of blacks receive more than whites in the same job position.

Delta's policy and practice have been to give minorities first opportunity to move into vacancies as they occur. Title VII does not require that existing white employees be discharged or demoted to make way for blacks. *Bing v. Roadway Express, Inc.*, 485 F.2d 441, 450 (5th Cir. 1973). As a result the figures given by McBride in his Brief in

Opposition are inapposite,[1] and the figures quoted above show that Delta has complied with the letter and spirit of the Civil Rights Act of 1964.

Furthermore, while Delta has felt compelled to respond to McBride's erroneous and misleading assertions about the merits of his discrimination claim, a statistical review of employment figures is not required by Delta's Petition, nor is it necessary to a decision of the questions the Petition raises. Delta asks this Court to review the standards by which the court of appeals has ordered a remand for consideration of the alleged class claims. Only if this Court should determine remand to be appropriate would the factual issues raised by the respondent in his Brief in Opposition be proper for consideration and then in the first instance by the district court.

III.

McBride has totally misconstrued the import of the first question presented by Delta in its Petition. His principal attack is based upon the proposition that an EEOC charge is not to be interpreted so narrowly that a layman's real grievances would be denied redress because of a mere technicality of language, a proposition with which we agree. However, he has failed to address the issue raised in Delta's Petition as to the standards by which the EEOC charge, investigation and concilation limit the permissible scope of an individual's Title VII complaint.

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[1]The job classifications referred to at pp. 2 and 3 of McBride's Brief in Opposition ceased to exist January 1, 1973, although the figures he attempts to associate with them are from a later date. McBride's fundamental lack of familiarity with the Delta system of job classifications for the period of time which he seeks to litigate further demonstrates the inappropriateness of his acting as a class representative.

McBride has also quoted extensively from *EEOC v. General Electric Company*, 532 F. 2d. 359 (5th Cir. 1976), which stands for the proposition that evidence of discriminatory action discovered by the EEOC in the course of its investigation is not to be ignored by the EEOC, nor is a complaint based upon a reasonable investigation to be narrowly construed because of an apparently narrow charge. This is not the issue involved in this litigation. Delta is questioning the action of the court of appeals in directing a remand to the district court for the purpose of conducting a systemwide investigation of employment practices when such an investigation was not suggested by the charge, was not investigated by the commission, and was not embraced within the scope of conciliatory efforts.

Every circuit which has addressed the point other than the Sixth has required that Title VII judicial actions bear a reasonable relationship to the scope of the underlying EEOC charge, investigation and conciliation—a relationship usually expressed as a limitation upon the scope of a Title VII judicial action "to the scope of the EEOC investigation which can reasonably be expected to grow out of the c h a r g e of discrimination." *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970). In this case, the Sixth Circuit has radically departed from this standard by requiring the district court to consider all of Delta's nationwide employment practices despite the limited scope of the charge, the scope of the actual investigation and conciliation efforts conducted by the EEOC or the wrong of which McBride complained in his judicial complaint. Prior to this case, no circuit has remanded a Title VII case for consideration of matters beyond the scope of the charge, investigation, conciliation, pleadings, proof and assignments of error.

McBride's Brief in Opposition does not address these points though they constitute principal issues on which Delta seeks review.

IV.

McBride has also entirely ignored the second issue presented in Delta's Petition. He makes no mention of the unorthodox action of the Sixth Circuit Court of Appeals in remanding the case for consideration of matters entirely beyond the scope of the pleadings, evidence at trial and assignments of error on appeal. But, nevertheless, the issue is of importance, and should be resolved by decision here.

V.

McBride has also sought to justify his right to represent a class of Delta employees, which until now he limited to the Memphis terminal. While he has cited a number of cases which assertedly stand for the proposition that a minority employee who has failed to establish discrimination as to himself may nevertheless be an appropriate representative of a class of discriminatees, he has totally ignored the recent decision of this court in *East Texas Motor Freight System, Inc., v. Rodriguez*,— U.S.—, 97 S.Ct. 1891 (1977). *Rodriguez* requires that "a class representative must be part of the class and 'possess the same interest and suffer the same injury as the class members.'" *Id.* at 1986. Since McBride's individual claim was denied before any class was certified in his case, a remand to consider representation by McBride of *any* class of Delta employees is entirely inappropriate. *Id.* at 1898, n. 12.

VI.

Simultaneously with the filing of his Brief in Opposition, McBride moved this Court for leave to proceed in forma pauperis pursuant to 28 U.S.C. §1915. Delta opposes such motion on the ground that McBride has been employed by Greyhound Lines for more than three years and is now earning in excess of $15,000.00 a year with only his wife as a dependent. (Appendix A-38 to Delta's Brief in Opposition filed September 20, 1977, in No. 77-5308.) As case authority clearly indicates, McBride is not a truly impoverished litigant who would be without legal remedy if not afforded the opportunity to proceed in forma pauperis. *Adkins v. E. I. duPont de Nemours & Co., Inc.*, 335 U.S. 331, 339 (1948); *Brewster v. North American Van Lines, Inc.*, 461 F.2d 649, 651; *Dreyer v. Jalet*, 349 S.Supp. 452 (S.D.Tex. 1972), *aff'd* 479 F.2d 1044 (5th Cir. 1974).

It is noteworthy that even after challenge of his right to proceed in forma pauperis in Cause No. 77-5308, he did not attempt to bolster his general affidavit with his own deposition. He relied solely on the deposition of a general sessions court clerk as to minor judgments which may or may not have been satisfied, the most recent of which was rendered in September 1973. Therefore, his motion should be denied.

WHEREFORE, Certiorari should be granted as prayed, and McBride's motion for leave to proceed in forma pauperis should be denied.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of October, 1977, three copies of the Petitioner's Reply to the Brief in Opposition were mailed, postage prepaid, to A. G. Burkhart, Jr., 1016 Derman Building, Memphis, Tennessee 38103, Counsel for Respondent. I further certify that all parties required to be served have been served.



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